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C O N F I D E N T I A L MANILA 005031

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TAGS: [PREL](#) [MARR](#) [CASC](#) [RP](#)
SUBJECT: MARINE CASE; NO IMMINENT COURT DECISION ON CUSTODY

Classified By: Ambassador Kristie A. Kenney, reasons 1.4 (b) and (d)

¶1. (U) The Court of Appeals on December 19 denied a motion by the defense lawyers for Lance Corporal Daniel Smith calling for an immediate decision to reverse Makati City Regional Trial Court Judge Pozon's December 4 order to detain LCpl. Smith temporarily in the Makati City Jail. The private prosecutor for the complainant in the original rape case filed a motion calling for the Appeals Court to send the decision on custody directly to the Supreme Court, since the issue is over treaty obligations. The Court has given the private prosecutor and the Solicitor General ten days to submit a response to the defendant's motion to release LCpl. Smith back into U.S. custody. The defense will then have five days to respond, after which the Appeals Court will schedule a hearing.

¶2. (C) Ambassador continues to be in frequent communication with Executive Secretary Ermita, whom President Arroyo tasked to spearhead the Philippine Government's efforts to restore custody to the U.S. in accordance with the Visiting Forces Agreement, as well as with Foreign Secretary Romulo and other Philippine leaders. She, as well as senior Embassy staff members continue intensive and ongoing contacts with leaders from the Departments of National Defense, Foreign Affairs, Justice, and Interior and Local Government. They have repeatedly highlighted the likelihood that the U.S. would have to cancel Balikatan 07 if there is no favorable resolution of the custody issue by December 21, and that the U.S. would also cancel other military activities that fall under VFA, including ship visits.

¶3. (U) Media commentaries are increasingly criticizing the "unequal" nature of the VFA and expressing support for continued Philippine custody over LCpl. Smith. Philippine Government officials have not been very noticeable in explaining the nature and benefits of the VFA to elite audiences or to the general public. Philippine officials do continue to maintain publicly and privately that LCpl. Smith should be in U.S. custody according to the VFA, and to express their frustrations with the judiciary.

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KENNEY